

79354-9

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER

v.

ANDRE P. BECKLIN, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF FERRY COUNTY

HONORABLE REBECCA BAKER

SUPPLEMENTAL BRIEF OF PETITIONER

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I.

INTRODUCTION

Petitioner, State of Washington, respectfully submits this supplemental brief as permitted by RAP 13.7(d) to address one issue presented by the petition for review.

II.

ISSUE PRESENTED

(1) Does the stalking statute, RCW 9A.46.110, permit liability founded upon the actions of others directed by the defendant?

III.

STATEMENT OF THE CASE

Respondent/defendant Andre Becklin was convicted by a jury in the Ferry County Superior Court of stalking. CP 125. Evidence at trial showed that the victim and her family were being followed and watched by numerous friends and acquaintances of the defendant. These actions started after the victim had obtained a protection order against Becklin. RP 74-78, 103-111, 116-118, 162-181, 186-192, 254-270.¹ Two

¹ RP denotes the consecutively numbered transcription of trial proceedings. SRP denotes the transcript of the sentencing hearing.

of those friends testified at trial and told jurors they were reporting on the victim to help the defendant, but denied that he had asked them to do it. RP 57-63, 66-70.

Defendant's counsel argued the case to the jury on theories that the victim should not be believed and that there was no evidence the defendant directed any of his friends to do anything. RP 309-311, 314, 317-324. The prosecutor argued that defendant had directed his friends to do what he himself was restrained from doing. RP 293-296, 299-300, 302-304. In rebuttal, responding to the argument that Becklin did not personally do all of the acts, the prosecutor told jurors that the friends were the defendant's "agents." RP 327. He also pointed out that defendant was with his friends on several of the occasions. Speaking to one specific instance, the prosecutor noted:

It wasn't circumstance that Mr. Becklin yelled for Glen Jarmin's help when he was trying to break into the back door of the McGee residence. Not circumstance at all. Assistance. Aiding and abetting. That's what it is, that's what this case is about, is enlisting others to do your own dirty work, and that's what Mr. Becklin did.

RP 331.

Over the course of deliberations, the jury sent out two questions. The first, in which the jury asked "can you stalk a party through a third person," was answered "yes" by the trial judge over

defense objection. RP 340-341; CP 123. The second inquiry, in which the jury asked whether there was a minimum “stalking distance” between stalker and victim, was answered “no, refer to instruction number 6 for the elements of the crime which need to be proven.” RP 343-344; CP 124.

The jury found defendant guilty of stalking. CP 125. He received a top-end standard range sentence of twelve months. SRP 31-32. He then appealed to the Court of Appeals, Division Three.

Appellant’s two arguments there involved the trial court’s decisions to permit amendments to the charging document and to answer the jury inquiries. *See* Brief of Appellant at 6-21. The respondent’s brief likewise addressed solely those issues. *See* Brief of Respondent at 9-15.

The Court of Appeals reversed the conviction on a theory not argued by the parties. The opening sentence of the published opinion states: “The crime of stalking as defined by the legislature in RCW 9A.46.110(1) cannot be accomplished through a third party.” State v. Becklin, 133 Wn. App. 610, 612, 137 P.3d 882 (2006). In the view of the majority, the trial court’s decision to answer “yes” to the first question was tantamount to instructing the jury on accomplice liability, a theory that was not available in a stalking prosecution. *Id.* at 615-620. Chief Judge Sweeney, dissenting, found that the trial court could properly

instruct on accomplice liability and that its answer to the jury's inquiry was correct. Id. at 620-621.

The State moved to reconsider, arguing that it had not put forth an accomplice liability theory under RCW 9A.08.020(3), but, rather, had sought to hold defendant responsible for the actions of non-culpable "innocents" under the form of complicity defined in RCW 9A.08.020(2)(a). Becklin was not an accomplice to anyone; neither were his friends acting as accomplices to him. *See* Motion to Reconsider at 8-14. The motion also argued that the complicity statute did apply to the stalking statute. Id. at 18-19. The Court of Appeals denied reconsideration. This Court then granted the State's petition for review.

IV.

ARGUMENT

A. COMPLICITY LIABILITY APPLIES TO STALKING PROSECUTIONS.

The Court of Appeals, as noted in the opening sentence of the opinion, concluded that the Legislature did not intend for the crime of stalking to be committed through third party action. Nothing in the language of the stalking statute prohibits application of the complicity principles of RCW 9A.08.020. The stalking statute should be construed in

the same manner as murder and every other criminal statute – a person can be held accountable for the actions of others working at his behest.

RCW 9A.46.100(1) provides in part:

- (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:
 - (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and
 - (b) The person being harassed or followed is placed in fear and;
 - (c) The stalker either:
 - (i) Intends to frighten, intimidate, or harass the person; or
 - (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed

RCW 9A.08.020(1) states: “A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.” RCW 9A.08.020(2) in turn states: “A person is legally accountable for the conduct of another when”:

- (a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or
- (b) . . .
- (c) He is an accomplice of such other person in the commission of the crime.

(Partial).

A “person”² commits the crime of stalking. A “person” is also accountable for the conduct of others when he or she, with the intent of committing a crime, gets another person to do the work – either as an innocent actor [RCW 9A.08.020(2)(a)] or as an accomplice – a person who acts with the purpose of committing the crime [RCW 9A.08.020(2)(c)].³ Accordingly, a “person” commits a crime when he does it himself or when she recruits others to do the prohibited acts for her. By its plain terms, the stalking statute appears to permit complicity liability just as every other crime does. *E.g.*, RCW 9A.32.030(a) [“A person is guilty of murder in the first degree when. . . .”]; RCW 9A.36.011(1) [“A person is guilty of assault in the first degree if he or she. . . .”]; RCW 9A.48.020(1) [“A person is guilty of arson in the first degree if he”]. Indeed, under the predecessor complicity statute, the Court of Appeals once rejected an argument that the statute did not apply to crimes outside of the criminal code, finding instead that it was applicable to “all crimes wherein one person could aid and abet another.”

² “‘Person’, ‘he’, and ‘actor’ include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association.” RCW 9A.04.110(17).

³ An accomplice must act with knowledge that his actions will promote or facilitate the commission of a crime. RCW 9A.08.020(3).

State v. Matson, 22 Wn. App. 114, 119, 587 P.2d 540, *review denied* 91 Wn.2d 1006 (1978). *Accord*, Ferguson & Fine, 13A Washington Practice, Criminal Law, §104 (1990) [“Accomplice liability can apply to any crime, whether or not included in the criminal code.”]

There have been countless convictions for complicity liability across the reported cases. *E.g.*, State v. Carter, 154 Wn.2d 71, 109 P.3d 823 (2005) [first degree murder]; In re Domingo, 155 Wn.2d 356, 119 P.3d 816 (2005) [first degree kidnapping, first degree robbery, attempted first degree murder]. While typically accomplice in nature, the cases also have noted other forms of complicity under the statute, including subsection (2)(a). *E.g.*, State v. Conte, 159 Wn.2d 797, 154 P.3d 194 (2007) [defendants alleged to have led others to commit campaign finance report violations by concealing true identity of campaign donors]; State v. Parmelee, 108 Wn. App. 702, 32 P.3d 1029 (2001) [convictions for stalking and violating protection order upheld where defendant had other unwitting prisoners send explicit mail to his former wife].

That is simply what happened here. Defendant had others do what he could not, and, if the witnesses are to be believed, apparently they were following the victim without realizing they were committing a crime. This was a classic case for liability under RCW 9A.08.020(2)(a).

While this should seem to be an open and shut issue, Division Three found that the definitions of “follows” and “harasses” precluded third party liability. 133 Wn. App. at 616. Other than citing the definitions, the majority presented no analysis as to why this was so. The two phrases are defined in RCW 9A.46.110(6):

(a) ‘Follows’ means deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and deliberately appears at the person’s home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another.

(b) ‘Harasses’ means unlawful harassment as defined in RCW 10.14.020.

In turn, “unlawful harassment” is defined in RCW 10.14.020 as:

. . . a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such a person. . . .

(Partial).

Nothing in these three definitions specifies that only one person can commit the crimes. There simply is no indication that the Legislature intended to limit liability only to a principal actor. In this regard, the Court of Appeals decision in State v. Parmelee, supra, is

instructive. There the defendant, a prisoner, had encouraged fellow prisoners to write his ex-wife explicit letters, telling them that she would like receiving them. Several did so. 108 Wn. App. at 706-707. The defendant was convicted of three counts of violating a protection order for persuading the prisoners to write the letters. Id. at 708. Two of the protection order counts were vacated because they also served as predicate offenses for the defendant's stalking conviction. Id. at 710.

This case is largely indistinguishable from Parmelee except for the nature of the violations involved – written contact as opposed to monitoring of movements. If innocent third parties could be used to accomplish stalking in Parmelee, they could so be used in this case as well. Accordingly, the Court of Appeals majority erred in finding that stalking could not be committed by use of third parties.

The trial court likewise did not err in failing to give an accomplice liability instruction because this case did not involve accomplice liability.⁴ As noted previously, complicity in this case was predicated under subsection (2)(a) rather than the accomplice subsection, (2)(c). While the Court of Appeals noted the prosecutor's use of the words "aiding and abetting" during closing argument, the context of that

⁴ Defendant has never argued that additional instructions were ever necessary at trial.

statement⁵ involved testimony concerning the defendant calling for help from his friend Jarmin when Becklin ran in to resistance from the victims. RP 331. In context, the argument simply showed that Becklin was working with his friends. It did not show that they were accomplices to his criminal behavior – or vice versa.

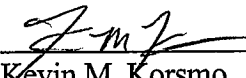
The trial court correctly determined that defendant could be criminally liable for having his “innocent” friends monitor the victim where he could not. This activity is prohibited by the stalking statute. The trial court did not err in answering the jury’s first question “yes” and in failing to give an instruction that was not requested.

V.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be reversed and the conviction should be reinstated.

Respectfully submitted this 3rd day of October, 2007.



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⁵ The entire statement is set forth in the Statement of the Case, *supra* at page 2.